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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1164

ALFRED A. KNOPF, INC., VICTOR L. MARCHETTI, JOHN D. MARKS,

Petitioners,

—v.—

WILLIAM COLBY, as Director of Central Intelligence of the United States, and HENRY KISSINGER, as Secretary of State of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

Supreme Court of the United States

October Term 1974

No. _____

Alfred A. Knopf, Inc., Victor L. Marchetti, John D. Marks,

Petitioners,

v.

William Colby, as Director of Central Intelligence of the United States, and Henry Kissinger, as Secretary of State of the United States,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 7, 1975.

Opinions Below

The opinions of the Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of Virginia are unreported. They are set out in the Appendix, infra., p. 1a and 19a, respectively. The opinion of the United States Court of Appeals for the Fourth Circuit in the predecessor case of United States v. Marchetti is reported at 466 F.2d 1309 (1972) and is set out in the Appendix, infra, p. 55a. The opinion of the United States District Court for the Eastern District of Virginia in United States v. Marchetti is unreported. It is set out in the Appendix, infra, p. 73a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 7, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether an injunction which requires petitioner Marchetti, a former employee of the Central Intelligence Agency, "to submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or corporation, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods," which authorizes the Central Intelligence Agency to forbid disclosure of "information which is classified and which has not been placed in the public domain by prior disclosure," and which forbids petitioner from disclosing such information "in any manner", is a prior restraint forbidden by the First Amendment.

2. Whether Respondents may, consistently with the First Amendment, prohibit publication of classified

information in the absence of proof that its disclosure would "surely result in direct, immediate and irreparable injury to the Nation or its people."

3. Whether, under the First Amendment and the doctrine of the Separation of Powers, the Executive Branch has the authority to initiate, and the Judicial Branch the power to entertain and decide, the action for an injunction against petitioner Marchetti.

4. Whether the standards enunciated by the Court below for proving that information is classified and in the public domain, which results in the deletion of 168 passages from a published book, violates the First Amendment.

5. Whether the injunction in this case, which has resulted directly in the first act of official censorship by the United States in its history, violates the First Amendment rights of petitioner Alfred A. Knopf, Inc., a book publisher, insofar as it has prevented publication of the full manuscript of the book, the CIA and the Cult of Intelligence, written by petitioners Marchetti and Marks under contract.

STATEMENT OF THE CASE

Petitioner Victor L. Marchetti was employed by the Central Intelligence Agency in October 1955. He resigned in September 1969 having reached the grade of GS-15. During his employment he had held a variety of posts including that of Special Assistant to the Deputy Director.

On April 18, 1972, the United States initiated an action for injunctive relief against Marchetti. Without notice, the government filed an application for a temporary restraining order before the Hon. Albert V. Bryan, Jr., U.S.D.J., in the United States District Court for the Eastern District of Virginia. Judge Bryan issued a temporary restraining order ex parte. The

T.R.O. restrained the defendant from "disclosing in any manner . . . any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources or methods . . . without prior authorization from the Director of Central Intelligence . . ."

The complaint upon which the T.R.O. was issued alleged that the purpose of the action was to secure an order enjoining Mr. Marchetti "from breaching the terms and conditions of secrecy agreements entered into by defendant while he was an employee of the Central Intelligence Agency (hereinafter referred to as the Agency), which agreements constitute a contract between defendant and the Agency, by disclosing, publishing, or otherwise revealing certain intelligence information or other classified information relating to intelligence sources and methods, and to obtain an order requiring the defendant to submit to the Agency for examination certain writings, in advance of their release, to insure that the information contained therein is not classified in accordance with Executive Order 10501, or otherwise covered by the terms and conditions of the aforementioned secrecy agreements. . ." (para. 3).

The secrecy agreements relied upon by the goverment were signed by Marchetti on October 3, 1955, at the beginning of his employment with the CIA, and on September 2, 1969, upon termination of his employment. The agreements are set out in the opinion of the Court of Appeals, App., infra, pp. 57a-59a 1/

1/ The Court of Appeals held that only the first agreement was enforceable. The government has not complained of that conclusion. References to "App., infra, _____" are to the appendix to this Petition.

Upon filing the complaint and application for a T.R.O., the goverment filed as sealed exhibits an unpublished article drafted by Marchetti, the typescript of an outline for a book entitled "a concept for a book about the Central Intelligence Agency," written by Marchetti, and, ex parte, an affidavit of Thomas H. Karamessines, 2/ then a Deputy Director of the Central Intelligence Agency, "analyzing the aforementioned article and specifying, for this Court's consideration, those [six] instances in which the aforementioned article discloses currently classified intelligence sources and methods." (Affidavit of Richard Helms, Director of Central Intelligence, dated April 17, 1972.)

On Friday, April 21, 1972, Marchetti appeared in the District Court with counsel and moved to dissolve the temporary restraining order and for access to the plaintiff's sealed exhibits. In an affidavit accompanying the motion to dissolve, Marchetti said, among other things:

> My years of experience in the Agency have led me to believe that the CIA and United States intelligence have grown beyond the actual needs of the nation. There is a great deal of redundancy, waste and inefficiency in the intelligence business today, and many of the operations undertaken by the CIA and other intelligence agencies are counter productive and harmful to the nation. Such activities, unrelated to the national security, would not be tolerated by an informed public and an informed Congress.

2/ The article, the book outline, and the Karamessines affidavit are contained in Vol. III of the appendices filed with the court below. Voume III is classified secret.

Both the motion to dissolve and the motion for access to the sealed exhibits were denied. 3/

On April 28, 1972, the date set for hearing on the preliminary injunction, the defense reluctantly asked a two week adjournment because the need to obtain security clearance for prospective witnesses impeded preparation of the defense case. The T.R.O. was continued and the hearing was adjourned to May 15th at which time the hearings on the preliminary and final injunctions were to be merged. In the interim, both parties engaged in discovery.

Marchetti filed his answer on May 12th, asserting that the complaint failed to state a claim upon which relief could be granted, that 28 U.S.C. §1345 did not confer jurisdiction upon the court to grant injunctive

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3/ Marchetti of course had copies of his articles and the book-outline which he had given to his attorneys at their first meeting. The motion for access referred only to the Karamessines affidavit, which contained the heart of the government's case.

The government informed Marchetti on Monday, April 24, 1972, six days after securing the T.R.O., that he and one of his attorneys had been cleared for access and could examine the sealed exhibits. In the course of the next few days other attorneys were cleared. Prospective witnesses had to be cleared before counsel would tell them essentially what the case was about. The lawyers' secretaries needed clearance before they could type material which included classified information. Some parties were cleared within twenty-four hours. Others took two days or more. Two prospective witnesses were denied clearance. One of them, Prof. Richard Falk of Princeton, was ordered cleared by the district judge after a hearing.

relief, that the court lacked jurisdiction over the subject matter, and that the secrecy agreements and E.O. 10501 4/ were illegal and void because they violated the First Amendment and the due process clause of the Fifth Amendment.

The government's case at trial consisted principally of Mr. Karamessines testifying to the contents of his affidavit. On cross-examination the defense sought to have Mr. Karamessines specifically describe the reasons underlying and supporting the conclusions asserted in his affidavit concerning the effect that disclosure of the six events related in the unpublished magazine article would have upon the national security and defense. By sustaining the government's objections to most defense lines of cross-examination, the district judge rejected the defense's First Amendment theory of the case. That theory rested on the claim that no restraint could withstand the presumption against prior restraints inherent in the First Amendment unless the government could show that disclosure of the specific materials involved, in the words of Mr. Justice Stewart in New York Times v. United States, 403 U.S. 713, 730 (1971) [hereinafter The Pentagon Papers Case], would "surely result in direct, immediate and irreparable injury" to the United States or its people.

After its motion for a directed verdict was denied (A. III-141)5/ the defense called Mr. Marchetti to

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4/ E.O. 10501 is the Executive Order which established the system of classification and the procedures for treating classified information. It has been superseded by E.O. 11652 effective June 1, 1972. E.O. 10501 is set out in 3 C.F.R. 979 (1949-1953 Comp.); E.O. 11652 is at 3 C.F.R. 375 (Supp. 1973).

5/ References to "A.__" are to the appropriate volume and page of the appendices filed with the court below.

testify.6/ His testimony related principally to the objectives he hoped to achieve in writing and speaking about the Central Intelligence Agency.

Mr. Marchetti stated that he has been addressing his "criticism to the United States Intelligence Community in general, of which the CIA is only one organization" (A. III-143). That he believed it "has grown too large, too expensive; it has grown beyond the needs of the people of this country" (Ibid.). He also believed that Congress does not receive enough information about the work-product of the CIA and the intelligence community (A. III-143-144).

He stated further that he believed that the "CIA and to a lesser extent other United States Intelligence Agencies have involved themselves in certain activities which I think are questionable . . . [and] are being carried out without the advice and consent of Congress or even without their knowledge" (A. III-144-145). And he stated that "it is time that more information be made available in the hopes that eventually Congress will conduct a review of the intelligence community in order to carry out some reforms" (A. III-145).

6/ The defense had planned to call four experts to testify in support of the claim that disclosure of the six events would not "surely result in direct, immediate and irreparable injury" to the United States or its people. Given the district court's rejection of that theory, outlines of the proposed testimony were put into the record as proffers.

It was and continues to be our claim that the government had not begun to approach the heavy burden required by The Pentagon Papers Case. The purpose of the proffered testimony was merely to nail down that claim.

He expressed the hope that "we may have a better organization and perhaps avoid the problems that have sometimes occurred in the past in other countries where secret organizations turn into . . . secret police-type organizations" (A. III-146).

Mr. Marchetti asserted that his experience within the CIA provides him with "some unique experience that allows me to make certain judgments that the ordinary citizen would not be able to make . . ." (Tr. 146). At the same time, he said, he believes "that I can make the main point, the main criticisms as to need for a greater direction and control, need for more economy and need for less indulgenece in covert action activities and the other criticisms and suggestions I have without providing any information that would be harmful to the national security" (A. III-148).

Mr. Marchetti also testified that, at that time, he had a contract with petitioner Knopf for publication of a non-fiction book concerning the CIA (A. III-149, 155, 157).

At the completion of Marchetti's examination and cross-examination, the district judge issued a preliminary injunction in the exact terms of the T.R.O. (A. III-178). On May 19th, he filed a memorandum opinion and order and issued a permanent injunction "identical in terms of the temporary restraining order heretofore entered."7/ The court held that "the contract [i.e., the secrecy agreements] takes the case out of the scope of the First Amendment; and to the extent the First Amendment is involved, the contract constitutes a waiver of the defendant's rights thereunder. It is these documents that the Court feels distinguish this case from New York Times v. United States, 403 U.S. 713 (1971), and render it no more

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7/ App., infra, p. 82a.

than a usual dispute between an employer and an employee regarding the revelation of information obtained by that employee during his employment. Consequently, there is no prior restraint and no such heavy burden on the United States to show irreparable damage to the country as was imposed by New York Times." App., infra, p. 80a.

Marchetti moved the Fourth Circuit for an expedited appeal and the case was set for oral argument on May 31st. More than three months later, the Fourth Circuit handed down its opinion, essentially affirming the decision of the district court but remanding "for the purpose of revising the order to limit its reach to classified information . . ." App., infra, p. 71a. The Court held that ". . . the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment." App., infra, p. 67a. The opinion acknowledged -- though only barely -- the existence of The Pentagon Papers Case, but failed to deal with the substance of that decision as it applied factually and conceptually to the case at bar. This Court denied certiorari, 409 U.S. 1063 (1972), three Justices dissenting.

On March 15, 1973, the district court issued an amended permanent injunction against Marchetti, based upon the Circuit Court's opinion, which is set out in the Appendix, infra, pp. 83a-85a. The injunction required, and continues to require Marchetti to submit to the CIA "any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources or methods"; and it authorizes the Director of Central Intelligence within thirty days to order deleted "any classified information relating to intelligence activities, [and] any classified information concerning intelligence sources and methods." It is

further provided that the injunction shall apply only with respect to classified information obtained by said defendant by reason of his employment under the aforesaid secrecy agreement and which has not been placed in the public domain by prior disclosure by the United States. . ."8/

Thereafter, Marchetti, in collaboration with a co-author, petitioner John Marks, a former State Department employee (A. I-13, II-358), completed a manuscript of a book highly critical of various CIA activities entitled "The CIA and the Cult of Intelligence" (A. I-4).9/

On August 27, 1973, pursuant to the injunction, Marchetti submitted a 517 page manuscript of that book to the CIA (A. I-3, 4). On September 26, 1973, exactly 30 days after submission, the CIA delivered to Marchetti's counsel a nineteen page letter specifying 339 deletions (15-20% of the manuscript) to be made prior to release of the document (A. I-17-37). Later on September 26, 1973, Marchetti and Marks submitted to petitioner Knopf, his publisher, the censored version of their manuscript from which the specified deletions had been physically removed (A. I-4). On October 15, 1973, 49 days after submission, the CIA, after meeting with Marchetti and his attorney, agreed to release 114 of the original 339 deletions, thus continuing to assert the right to require that 225 portions of the manuscript

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8/ It is to be noted that while the second injunction issued by the District Court applies by its terms solely to "classified" information, anything whatsoever written by Marchetti concerning intelligence, whether fiction or non-fiction, is subject to an automatic 30 day prior restraint while the Director of Central Intelligence picks those items he determines are "classified".

9/ It was stipulated at the start of the trial that Marks would be bound by the ultimate determination

be deleted (A. I-38-51). On February 5, 1974, more than 4 months after submission, the CIA delivered a letter releasing a further 29 of the remaining 225 deletions, and on February 27, 1974, exactly 5 months after submission and literally on the eve of trial, the CIA withdrew from its position as to 57 additional deletions -- leaving 168 at issue (A. II-17-18).

The instant suit was filed in the United States District Court for the Southern District of New York on October 31, 1973 by petitioners Marchetti, Marks and Knopf. On the government's motion, the case was ordered transferred to the Eastern District of Virginia on November 12, 1973 (A. I-71).

The present complaint sought restoration of the items ordered deleted by the CIA by putting into issue the question of whether such items were in fact "classified" as required by the terms of the injunction and by claiming that at least some items were in the public domain or had been learned outside the course of Marchetti's and Marks' employment.10/ To ensure reviewability here, the complaint also raised the following

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(Footnote continued from previous page.)

in this action as to freedom to publish or restriction on publication of the book in issue to the same extent as Marchetti and as though he, Marks, were a party to the injunction (A. I-110-111). The quid pro quo was discontinuance of the government's contersuit against Marks for the same perpetual injunction secured against Marchetti.

10/ As part of the stipulation referred to supra note 9, it was also agreed that the injunction covered information learned by Marks during the course of his employment at the Department of State.

claims 11/ which had been explicitly rejected in the first round of litigation by the courts below:

1) that censorship of the manuscript violated the First Amendment, and was a forbidden prior restraint, because "publication of the information contained in the deletions will not surely result in direct, immediate and irreparable injury to the Nation or its people";

2) that the secrecy agreements themselves violated the First and Fifth Amendments;

3) that the injunction violated the First Amendment and was void upon its face;

4) that there was no statutory authority to support the courts' jurisdiction in issuing the injunction.12/

11/ A. I-6-8.

12/ These issues were raised and preserved throughout trial and on appeal. Since the Fourth Circuit entertained (and rejected) the claims again in this second round of litigation (App., infra, p. 15a), they are properly before this Court. Even if they had not been entertained, they would not be res judicata in this Court. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968); Mercer v. Theriot, 377 U.S. 152 (1964); Hamilton-Brown Shoe Co. v. Wolf Bros. and Co., 240 U.S. 251 (1916).

Trial was held on February 28, March 1, and March 4, 1974.13/ As its witnesses, the government produced the four deputy directors of the CIA and, as a rebuttal witness, the Director of Central Intelligence, Respondent Colby. Cross-examination by the petitioners, bearing on either the "reasonableness" of classification decisions or whether publication of the full manuscript would surely result in direct, immediate and irreparable harm to the public, was objected to and said objections were sustained by the District Court on the basis of the prior Marchetti decision (A. II-112, 113). Marchetti and Marks testified for the plaintiffs, as did Dr. Morton Halperin, petitioners' expert witness, in rebuttal.14/ After the conclusion of trial, both sides submitted post-trial and reply briefs and oral argument was had. The District Court's decision was rendered on March 29, 1974.

13/ Much of it was in camera and much of the trial transcript is sealed. Likewise, many of the exhibits are sealed, though petitioners and their attorneys had full access to them.

14/ At trial the government assumed the burden of proof on the issue of classification. Petitioners assumed the burden of proof on the issues of public domain and course of employment. On the public domain issue, petitioners submitted documents showing that 74 deleted items had been publicized, either in the public press or in congressional documents. On the course of employment issue, Marchetti and Marks testified that, between them, they had learned of 47 of the deleted items outside their course of employment by the CIA and the Department of State respectively. The district court found that only seven items had been obtained by the petitioners outside the course of their employment though commenting specifically on the petitioners' candor throughout their testimony (A. I-120; App., infra, p. 30a).

The Decision of the District Court

The opinion of the court, after reviewing the history of the action, dealt first with the issue of classification.

Proof of classification, the court noted, was attempted by the government by means of the testimony of four deputy directors of the CIA as to the deletions demanded, - each deputy director testifying in effect that he had read the manuscript and had then made the determination with his staff that a particular deleted item contained classified information (App., infra, p. 21a). The court noted that while the testimony of the deputies was that the determination of the classified nature of information was stated to be based on the witness' personal experience, institutional memory, record review, and personal judgment:

> "No director had himself classified any of the information, nor could he tell in any given instance, when the information had been classified or by whom." App., infra, p. 22a.

Upon analysis of the testimony the court concluded that:

> "Although this is denied by them, the decision as to each item here in question by an individual Deputy Director seems to have been made on an ad hoc basis as he viewed the manuscript, founded on his belief at that time that a particular item contained classifiable information which ought to be classified." (App., infra, p. 23a.)

Based upon this finding the District Court concluded the government had failed to meet its acknowledged burden of proof, and that the deputies' testimony had simply failed to prove classification:

". . .[T]here should be, in the Court's view, some evidence that the affirmative action contemplated by the Executive Order was taken, before the end of Marchetti's or Marks' employment, to warrant a finding by the Court of classification. The ipse dixit of the Deputy Directors after receipt of a manuscript is not sufficient, and cannot suffice if the first amendment rights of these plaintiffs or others like them are to survive." (App., infra, p. 23a.)

Next, the court considered in detail the exhibits 15/ submitted by the government. Its specific findings as to each of the exhibits are set out in Appendix I of the district court opinion (App., infra, pp. 32a-48a). On close examination, the court found that the evidence supported the fact of classification as to 26 deletions and 2 partial deletions of the 168 items still in controversy. The Court so found despite the fact that it encountered considerable difficulty in specifically relating those deletions to classified information supposedly contained in the exhibits.16/

15/ The exhibits consisted of 103 documentary items purporting to show that particular deleted items had in fact been classified. All the exhibits were themselves said to be classified and are all sealed. None of the exhibits indicated that any particular deleted item had been classified, and much of the deleted information was not referred to in any exhibit. These exhibits are in the record at A. II-449 et seq.

16/ Thus, the court found that certain of the government exhibits evidenced the "fact" of classification, only in that they "can conceivably support classification" (A. I-125) or "conceivably could evidence" the classification of a particular operation (A. I-127) or the like.

It found many of the exhibits "meaningless" (A. I-131), and others proof of "nothing" (A. I-132, 133).17/

Concluding its decision as to classification, the District Court noted:

> "The result of this may be to release some sensitive information; however the rationale underlying the fixing of classification as the dividing line between what could be revealed and what could not was the assumption that, at the time the determination was made to classify, there had been a weighing of the competing interests of national defense and foreign relations on the one hand and the public's right to know on the other hand. It is not too much for the public and these plaintiffs to expect that such a determination be in fact made as to identifiable information, at an ascertainable time prior to the time of viewing the manuscript, if that determination is to be the basis of denying the otherwise clear freedom to publish. As indicated, except in certain instances, there just is no evidence that this was done." (App., infra, p. 25a.)

Turning next to the question of the public domain status of the deleted items the court accepted the government's position that classified information could be published only if such information was placed in the public domain officially, App., infra, p. 25a.

17/ One exhibit, not entirely unrepresentative, consisted of two sheets of paper stamped "secret" and, outside of the pre-printed form material, contained virtually nothing but the name of a person who was the subject of several deleted passages in the manuscript (A. II-471, 473).

Acknowledging that that was an admittedly narrow reading of the injunction (A. I-115), it concluded that, under that narrow standard, no items deleted fell within the public domain.18/ It found 7 items to have been learned outside the course of petitioners' employment, and thus publishable (App., infra, p. 30a).

The trial court thus based its findings as to classification, public domain, and course of employment upon all of the materials received in evidence. The findings as to each deletion were the result of a careful study by the court of each item deleted and the materials related thereto, and represented a thorough and, we submit, a conclusive factual record to be considered on appeal.

The Decision of the Court of Appeals

Both sides appealed, and the Court of Appeals granted a motion to expedite oral argument, which was held on June 3, 1974. More than eight months later 19/ (almost a year and one-half since the manuscript

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18/ Recognizing that a reviewing court would perhaps take a broader view, the court considered each of the 74 items claimed by plaintiffs to be so well known to the public that they could be considered as in the public domain. Appendix II to the Court's Opinion, App., infra, pp. 49a-54a, described the Court's findings and the basis thereof as to each item under this less circumscribed test. Under that test, the court would have allowed publication of 14 items in full and of 15 other items in part.

19/ It is noteworthy that the Court of Appeals had required the CIA to make its determination as to what material it believed to be classified within 30 days of submission of material to them because of the First Amendment considerations present in the case. Cf. Freedman v. Maryland, 380 U.S. 51 (1965).

had first been submitted to the CIA pursuant to the District Court's injunction) the Fourth Circuit handed down its decision.20/ It held that the District Court was wrong in allowing publication of any of the deleted items, principally because it had imposed a burden of proof on the government which was "far too stringent" (App., infra, p. 15a). In the course of its 14 pages on burden of proof, the Court's opinion only once acknowledges the existence of the First Amendment to the Constitution. Throughout the entire opinion, the First Amendment is referred to but twice, and then fleetingly.

As to proof of the fact that the deleted items are classified, the Court of Appeals opinion holds essentially that the government's burden of proof is satisfied if an official testifies that the items should have been classified and if those items are "contained in a document bearing a classification stamp." The court thought "it would have been nice" if the government could have produced the officer who actually classified each deleted item, but that, the court asserted, "was a practical impossibility." The opinion then holds that "the presumption of regularity" is an adequate substitute for proof. That presumption states that "courts presume that [public officers] have properly discharged their official duties" (App., infra, p. 11a).

In response to the District Court's finding that many of the government's exhibits were "meaningless" in establishing classification, the Court of Appeals held that it was proper for the government to delete everything from such classified documents except the

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20/ In the meantime the book had been published by petitioner Knopf with 168 deletions, since restoration was stayed pending appeal. By the time the Fourth Circuit decided the case, a paperback edition, with the same deletions, had also been published.

information which was said to match a deleted item.21/

As to petitioners' right to show that most deleted items were not even subject to classification under the appropriate Executive Order 22/ -- a claim put forward on constitutional grounds by petitioner Marchetti in both rounds of litigation and rejected by the District Court and the Court of Appeals -- the court below acknowledges that the amended Freedom of Information Act "provides for judicial review of questions of classifiability" and directs such review to be conducted on remand.

On the public domain issue, the Court of Appeals affirmed the standard applied by the District Court. As to the seven items found by the District Court to have been learned by petitioners outside their employment, or which would have been learned afterwards "in any event," the Court of Appeals reversed. Again, the Court of Appeals invented a presumption: that "neither [petitioner] should be heard to say that he did not learn of information during the course of his employment if the information was in the Agency and he had access to it." Thus, in face of Rule 52(a), F. Rules Civ. P., the Court of Appeals told the district judge that his personal assessment of credibility was

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21/ The opinion erroneously states that "most" of these documents bear "Top Secret" stamps. Actually, of the 103 exhibits introduced by the government only 22 of them are stamped "Top Secret" (Exhibits 10, 36, 58-65, 66, 67, 69, 73, 82, 83-85, 87, 90, 95). Most of the others are "Secret," and some are "Confidential."

22/ Under the shorthand developed in the course of trial and appeal, this concept has come to be known as "classifiability," and will be so referred to throughout the Petition.

"clearly erroneous," though not stating why.

Finally, the Court of Appeals again considered the First Amendment challenge to the injunction and secrecy agreement and rejected it preemptorily (App., infra, p. 15a).

REASONS FOR GRANTING THE WRIT

This case has two dubious distinctions. It is the first in the nation's history which involves an author who is perpetually required by court injunction to submit his books and articles to a federal agency for censorship before submitting them for publication. And it is the first in the nation's history which involves a book and a publisher which have been officially censored by the United States under the authority of an injunction.

I

THE PRIOR RESTRAINT OF TWO AUTHORS AND THEIR PUBLISHER BY THE INJUNCTION ENTERED IN THIS CASE VIOLATES THE FIRST AMENDMENT.

By the terms of the injunction as modified by the opinion of the Court of Appeals in United States v. Marchetti, petitioner Marchetti must submit to the Central Intelligence Agency all writings, fiction or non-fiction, which "relate to or purport to relate to the Central Intelligence Agency, intelligence or intelligence activities, or intelligence sources or methods," before release to any other individual or corporation. The CIA is authorized within thirty days to withhold approval of "information which is classified and which has not been placed in the public domain by prior disclosure." Publication or disclosure by the defendant of any material so designated by the CIA is a contempt. Since the injunction forbids Marchetti from

disclosing "in any manner" classified information not in the public domain, he is also subject to a contempt prosecution for any spoken disclosure of such information if the CIA asserts it is classified.

Certiorari should be granted because this injunction is in direct conflict with the First Amendment and this Court's decision in New York Times v. United States, 403 U.S. 713 (1971), imposing as it does a prior restraint upon Marchetti without the United States having been required to prove that disclosure of the information sought to be restrained would "surely result in direct, immediate and irreparable injury to the Nation or its people." 403 U.S. at 730 (Stewart, J., concurring). The Court of Appeals, ignoring this Court's holding that "the Government '. . . carries a heavy burden of showing justification for the imposition of such a [prior] restraint,'" 403 U.S. at 714, adopted an entirely different standard. Under its standard, the only "burden" on the United States in this case is to show that information is classified.23/ If so, it may prohibit its publication. That, we suggest, is no burden at all, for the instinct of government officers to classify indiscriminately is notorious.24/

Despite the difference in holdings, the only difference between the facts in New York Times v. United

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23/ Indeed, even that standard has been vitiated by the Court's holding that an item to be censored need only be classifiable and contained in some document stamped with a classification stamp, whether or not such stamping was related to the item in question or not.

24/ See Gravel v. United States, 408 U.S. 606, 642 n.9 (1972) (Douglas, J., dissenting).

States and the facts in this case is the existence of Marchetti's 1955 secrecy agreement. The central question, therefore, is whether that agreement by itself can overcome the "presumptive unconstitutionality" of prior restraints. See, e.g., Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971); Pittsburgh Press v. Human Relations Comm., 413 U.S. 376, 396 (Burger, C.J., dissenting) (1973). We believe it cannot.

If government employees "are not relegated to a watered down version of constitutional rights," Garrity v. New Jersey, 385 U.S. 493, 500 (1967); see also Pickering v. Board of Education, 391 U.S. 563 (1968); Epperson v. Arkansas, 393 U.S. 97, 107 (1968), how does Marchetti's right to publish become so much weaker than that of the New York Times and The Washington Post? The only answer supplied by the Court of Appeals is that Marchetti was "contractually bound to respect" the 1955 secrecy agreement (App., infra, p. 60). But given the decision in New York Times and the Constitution's abhorrence of prior restraints, this Court must confront the settled principle (ignored by the court below) that the government may not enforce contract provisions which are "barred by some controlling constitutional prohibition." King v. Smith, 392 U.S. 309, 333 n.34 (1968). While private parties may agree by contract to waive their rights under the Constitution, when the government is a party to an agreement such waivers are unenforceable if they involve fundamental rights of free speech, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pickering v. Board of Education, 391 U.S. 563 (1968), or the right to equal protection or due process of law, e.g., Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kramer, 334 U.S. 1 (1948). See also Escalera v. New York City Housing Authority, 425 F.2d 853 (2nd Cir. 1970). Consequently, no matter what the terms of a so-called secrecy agreement, the First Amendment prohibits it enforcement through the

device of a prior restraint.25/

The development of this case through its nearly three years of litigation - with its continued extended delays, each of which violated the First Amendment - amply demonstrates the wisdom of and provides the factual underpinning for the "presumptive unconstitutionality" of the injunction issued in this case.

This lawsuit began with CIA asserting that 339 portions of the manuscript could not be published. As the trial date drew closer, the CIA withdrew from scores of the deletions they had previously ordered, until by the morning of the trial (six months after the submission of the manuscript), 168 rather than 339 deletions were at issue. Mr. Colby, when asked about the decision to cut down the number of deletions, testified as follows:

> The basis of it was that while they were technically classified -- and I still think they are -- they are not such that if you want to win this case, which we would like to win for the importance it has for the future of intelligence business in our country -- We don't want to object to things which really aren't that important, even though they are technically classified. (A. II-1129-30; emphasis added)

25/ The sweep of the Court of Appeals perspective on the issue in this case is demonstrated by its statement that "the law would probably imply a secrecy agreement had there been no formally expressed agreement. . ." (App., infra, p. 67a). Thus the secrecy agreement in this case is, according to the Court of Appeals, merely a happy coincidence rather than the controlling feature of the case.

The action of the CIA in initially barring publication of "things which really aren't that important" is ample evidence that that which was presumptively unconstitutional should not be deemed constitutional on the basis of meeting the tests set forth in the outstanding injunction. Our point is not only that the CIA has acted capriciously -- although, of course, it has -- it is also that such capricious acts demonstrate the presumptive unconstitutionality of the injunction. Put simply, the power to censor leads inexorably to the overexercise of such power.

The injunction against Mr. Marchetti is a perpetual burden which requires him, on threat of contempt, to submit to the CIA anything he writes which relates to "intelligence," no matter how remotely. As the first such injunction in the nation's history, it warrants plenary examination by this Court.

Finally, the addition of Knopf as a party vitally affects the manner in which this case must be viewed. Knopf is a publisher and, as such, is entitled to the same rights as any other publisher under the First Amendment. Whatever the limitations on the rights of Marchetti and Marks as a result of "contract", Knopf is surely entitled to the full panoply of First Amendment protections set forth in The Pentagon Papers Case and in all the other First Amendment decisions.

There are three distinctions and three only between this case and The Pentagon Papers Case, as they relate to Knopf's rights. The first is that the Times, unlike Knopf, had in hand the documents it sought to publish before the entry of an injunction against publication; the second is that the government did not raise in The Pentagon Papers Case -- although it perhaps could have -- the existence of "secrecy agreements" with the source or sources of the Times; the third is that the Times published TOP SECRET documents in their original form, as opposed to a manuscript independently created without reference to such documents. The first two of these

distinctions do not come close to permitting a completely contrary result in the two cases; the third suggests that, if anything, Knopf's rights should be greater than were those of the Times -- and in any event no less extensive. This issue also warrants plenary reviewed by the Court.

II

CONGRESS HAS NOT AUTHORIZED THE GRANTING OF INJUNCTIVE RELIEF IN CASES SUCH AS THE PRESENT DESPITE EFFORTS OF THE CIA TO PERSUADE IT TO DO SO. THE COURT OF APPEALS ERRED IN HOLDING THAT INJUNCTIVE RELIEF COULD BE GRANTED IN THE ABSENCE OF SUCH STATUTORY AUTHORIZATION.

In his deposition in this action, respondent Colby testified that the CIA was seeking congressional authorization to obtain injunctive relief against former employees with respect to their disclosure of classified information. (A.II-1136) In a letter produced by Mr. Colby and proferred by counsel to the CIA for identification in the District Court, Mr. Colby explicitly conceded that "there is no existing statutory authority for injunctive relief" in cases such as the present. The letter stated the following:

> "The continued effectiveness of the United States foreign intelligence collection effect is dependent upon the adequate protection of the intelligence sources and methods involved. In recognition of this, Congress, under Section 102(d)(3) of the National Security Act of 1947, made the Director of Central Intelligence responsible for the protection of intelligence sources and methods from unauthorized disclosure. Unfortunately, there is no statutory authority to implement this responsibility.

> In recent time, serious damage to our foreign intelligence effort has resulted from unauthorized disclosures of information related to intelligence sources and methods. The circumstances of these disclosures precluded punitive criminal action.
>
> "In most cases, existing law is ineffective in preventing disclosures of information relating to intelligence sources and methods. Except in cases involving communications intelligence, no criminal action lies against persons disclosing classified information without authorization unless it is furnished to a representative of a foreign power or the disclosure is made with intent to harm the United States or aid a foreign power. It also requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution. Furthermore, prevention of disclosure in order to avoid serious damage to the intelligence collection effort better serves the national interest than punishment after disclosure; however, there is no existing statutory authority for injunctive relief." (emphasis added) (A. I-154-56).

This conceded absence of statutory authority for the relief granted by the courts below is a problem which Mr. Colby has sought -- and is still seeking -- to remedy by appearances before Congress urging such legislation. (Hearings on H. R. 12004 before a Subcomm. of the House Comm. on Government Operations, 93rd Cong., 2d Sess. 363 (1974)) Thus far Congress has not adopted any such legislation.

The absence of legislative action in this area is all the more stark in light of the fact that in one

limited and carefully defined area Congress did explicitly grant authority to the executive to apply for injunctive relief similar to that which was granted by the district court. Under 42 U.S.C. Section 2280 the Attorney General is authorized, on the recommendation of the Atomic Energy Commission, to make an application to a United States District Court for an injunction against the threatened disclosure of atomic secrets. This statutory basis for an injunction thus stands as the sole exception to the use only of criminal sanctions for the unauthorized disclosure of national security information.

It is precisely the absence of legislation authorizing prior restraints that was a significant factor in the holding of several members of this Court in The Pentagon Papers Case that the prior restraint there could not stand. See 403 U.S. at 720 (concurring opinion of Mr. Justice Douglas joined in by Mr. Justice Black); id. at 732 (concurring opinion of Mr. Justice White joined in by Mr. Justice Stewart); id. at 743 (concurring opinion of Mr. Justice Marshall).26/ These opinions emphasize, at the very least, the impropriety, under principles of separation of powers, of granting injunctive relief in an area in which any such relief, even if it were authorized by Congress, would be presumptively unconstitutional. The decision of the Court of Appeals is not only contrary to those opinions, but

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26/ See also 403 U.S. at 753-4 (dissenting opinion of Mr. Justice Harlan, joined by Chief Justice Burger and Mr. Justice Blackmun). The first question raised in Mr. Justice Harlan's opinion relates to a question raised in this case - the interrelationship of the cases of In Re Debs, 158 U.S. 564 (1895), relied upon by the Court of Appeals - and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See P. Junger, "Down Memory Lane: the Case of the Pentagon Papers", 23 Case Western Reserve L. Rev. 3 (1971).

to the decision of this Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 79 (1952). Certiorari should be granted to resolve these inconsistencies.

III

THE STANDARDS ESTABLISHED BY THE COURT OF APPEALS TO PROVE THAT DELETED ITEMS ARE CLASSIFIED, ARE ERRONEOUS.

This Court's imposition of a heavy burden of proof on the government to justify a prior restraint, relates not only to the injunction as a whole, but also to construction of its terms. Thus, if there is to be an injunction, its terms must be construed so as to limit as far as possible infringement of First Amendment rights. The opinion of the District Court below did just that on the question of proof of classification; but the Court of Appeals, in setting aside the District Court's findings, prostrated itself before the totem of national security and completely ignored the compelling claims of free speech and free press which are guaranteed by the First Amendment and by decisions of this Court.

Not only did the Court of Appeals fail to apply the standard of proof which is required by this Court's decision in The Pentagon Papers Case, but it so succumbed to the CIA's national security claims that it created a so-called presumption of regularity which flies in the face of unrebutted testimony at trial, and is in fact irrebuttable as formulated by the Court.

Petitioner's expert, Dr. Morton Halperin, testified at trial that there is "a very large amount of information which is classifiable . . . and which is, in fact, not classified." He went on to say that ". . . judgments are made every day by officials of the Government at various levels that information that could be classified, in that it fits under the criteria of the Executive

Order, either should not be classified initially or should be declassified" (A.II-211). Thus, the Court of Appeals' presumption, in addition to flouting First Amendment interests, does not even have a basis in reality. The Court's fundamental error was its belief that "a classifying officer is required to classify a document containing classifiable information. . ." (App., infra, p. 11). That assertion is simply wrong; there is no support for it in the testimony, in any statute or regulation, or in practice.27/

Furthermore, the presumption as formulated is actually irrebuttable because it is apparently designed to deprive the district courts of the opportunity not to believe the testimony of the CIA officials in question. Judge Bryan did not believe the testimony of the CIA officials who testified before him.28/ The new

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27/ The Court of Appeals also assumed incorrectly that the contents of the government's exhibits related to the corresponding deleted items and established that they were in fact classified. But the district judge thought otherwise, except for the 26 items he concluded were classified. As to the others, based on his study of the deleted items in context, and his study of the government's exhibits, he concluded that the presence of some words in the exhibits that had some relation to the words in the deleted items, did not establish the fact of classification. The reason is self-evident upon examination of the government's exhibits.

28/ App., infra, p. 23a. There was overwhelming support in the record for Judge Bryan's determination as to credibility. Compare A.III-101 with A.II-150; see also A.II-89-90; A.II-92-93; A.II-119-120; A.II-132; A.II-182-85.

standard of proof established by the Court of Appeals is such that it can be overcome only by petitioners' showing that the information was not in fact classified. The Court neglects to instruct us how to prove that negative. Presumably, petitioners could call all CIA employees and ask each of them if they classified the particular deleted item. That "would be nice," but far more of "a practical impossibility" than requiring the Agency affirmatively to show with some particularity - and in the manner that courts historically required proof to be adduced - that the item was classified.

This Court should grant certiorari, therefore, in order to decide the issues relating to burden of proof in light of the First Amendment.29/

Finally, petitioners have maintained throughout all stages of the litigation that they are entitled as a constitutional matter to attempt to show that deleted items are not subject to classification under the terms of the appropriate Executive Orders. That claim was rejected by the courts below, although Judge Craven expressed his limited agreement with the claim in his concurring opinion in United States v. Marchetti (App., infra, p. 71a). The Court of Appeals, however, has acknowledged that the 1974 amendments to the Freedom of Information Act,30/ 5 U.S.C. Section 552, which allow "any person," in demanding government information said to be classified, to put the government to the test of

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29/ Also drawn in issue, should certiorari be granted, are the standards applied by the courts below in construing the public domain and course of employment provisions of the injunction.

30/ P.L. 93-502, 88 Stat. 1561.

showing that withheld information is both classifiable and "in fact properly classified." 5 U.S.C. Section 552(b)(1)(A). "The burden is on the agency to sustain its action." 18 U.S.C. Section 552(a)(4)(A).

The opinion below does not address itself to the nature of proof or the extent of the government's statutory burden of proof in establishing classifiability. The question also exists whether either of those standards are variable as between a statutory claim under the Freedom of Information Act and petitioners' claim under the First Amendment. The interests of both justice and judicial economy speak on behalf of review of those issues by this Court upon a grant of certiorari.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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